ALVIN E. AND MARY R. LEUKUMA

IBLA 86-423 Decided August 4, 1988

Appeal from a decision of the Eastern States Office, Bureau of Land Management, rejecting color-of-title application ES 35437 (Minn.).

Affirmed.

1. Color or Claim of Title: Generally--Color or Claim of Title: Applications

   A class 1 color-of-title claim requires good faith and peaceful, adverse, possession by a claimant, his ancestors, or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which on its face purports to convey the claimed land to the applicant or the applicant's predecessors. When the applicant fails to produce such a document, the application must be rejected.

2. Color or Claim of Title: Generally--Color or Claim of Title: Applications

   A class 2 color-of-title claim requires good faith and peaceful, adverse, possession by a claimant, his ancestors, or grantors, under claim or color of title for a period commencing not later than Jan. 1, 1901, to the date of application during which time they have paid taxes levied on the land by state and local governmental units. BLM properly rejects a class 2 application when these requirements are not met.

3. Color or Claim of Title: Applications--Color or Claim of Title: Good Faith

   Good faith, as that term is used in the Color of Title Act, 43 U.S.C. | 1068 (1982), requires that a claimant and his predecessors in interest reasonably believe that no defect exists in the title to the land claimed. The Department may consider whether a claimant's belief was unreasonable in light of the facts actually known or available to the claimant or a predecessor.

APPEARANCES: Richard D. Gentry, Esq., Winsted, Minnesota, for appellants.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Alvin E. Leukuma and Mary R. Leukuma appeal from the January 24, 1986, decision of the Eastern States Office, Bureau of Land Management (BLM), rejecting their color-of-title application, ES 35437 (Minn.). In its decision, BLM stated that the application was rejected for both class 1 and class 2 claims "because the applicants have failed to submit any documents which describe, mention or appear to convey the claimed land to them or their predecessor and have failed to meet the good faith requirements." BLM provided the following background and analysis:

> Mr. Alvin E. Leukuma and Mrs. Mary R. Leukuma have applied for the purchase of two islands in Swan Lake described as Tracts 37 and 38, Township 119 North, Range 28 West, Fifth Principal Meridian, Minnesota. Application is made under the provisions of the Act of December 22, 1928, as amended, 43 U.S.C. 1068, 1068a (1982), under claim of both Class 1 and Class 2.
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> These two islands were omitted on the original plat completed by the Surveyor General's office, June 8, 1857. A subsequent survey was executed and completed by the Department of the Interior on July 9, 1981 for the two islands in Swan Lake, now known as Tracts 37 and 38, same township and range.
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> On Form 2540-2, Conveyances Affecting Color or Claim of Title, Richard Gentry, the attorney for the applicants stated that the applicants do not have any documents which mention or appear to convey the claimed land to claimants or their predecessors.
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> Alvin Leukuma stated in his affidavit dated October 8, 1985 which was enclosed with his color of title application that he and William Kerkela, his predecessor, learned in 1962, about five years before William Kerkela's death, that there were no deeds or records at the county courthouse indicating any ownership of the tracts in the name of "Kerkela". Good faith requirements of the Act necessitate that claimants and his predecessor in interest honestly believe there was no defect in the title, Lester and Betty Stephens, 58 IBLA 14 (September 16, 1981).
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> The possession of a predecessor in interest may be tacked on to satisfy the statutory period only if predecessor's possession is in good faith. Knowledge that title to the land is actually in the United States breaks the chain of title and the holding period of the claimant begins to run anew, Joe I. and Celina Sanchez, 32 IBLA 228 (September 20, 1971). The lack of good faith possession by Mr. William Kerkela, as claimant's predecessor in interest is evidenced by Alvin Leukuma's affidavit stating that Mr. Kerkela

> obtained knowledge in 1962 that there were no deeds on record at the County Courthouse indicating any ownership of the tracts by him. This prior possession may not therefore be tacked onto that of Mr. and Mrs. Leukuma.

In their statement of reasons (SOR) for appeal, appellants dispute BLM's conclusion that they "do not have any documents which mention or appear to convey the claimed land to claimants or their predecessors." They rely upon a photocopy of the Last Will and Testament of William Frank Kerkela, "sole surviving heir of John Kerkela, who moved onto Tract 37, and constructed a house thereon, prior to 1904, and said William Frank Kerkela, son of said John Kerkela, resided in said house on Tract 37 until his death in 1967" (SOR at 1). The unprobated will devises William Frank Kerkela's property to Alvin Leukuma. According to appellants, the will "can be probated at any time, with the result that the interest of John Kerkela * * * would be decreed to applicant Alvin Leukuma" (SOR at 2).

Alternatively, appellants point to a quitclaim deed dated October 21, 1985, whereby Helen N. Lisk conveyed her interest in Tracts 37 and 38 to appellants. They state that the deed had been filed in the county recorder's office on October 29, 1985, and that "[i]t was immediately preceded by the recording of an Affidavit of Survivorship and death certificate relative to the death of Fritz Lisk on August 25, 1984" (SOR at 2).

Appellants argue that because Alvin Leukuma learned in 1962 that there was no ownership of certain tracts of land in the name of Kerkela, "it doesn't necessarily follow that they received information or knowledge that title to the land was actually in the United States" (SOR at 3). They assert that they have farmed the tracts at issue since 1950, that during that time they have paid rent to "Kerkela and/or Lisks," and that if they had known the land belonged to the United States they would not have done so.

[1] Section 1 of the Color of Title Act, 43 U.S.C. | 1068 (1982), sets forth the requirements a claimant must meet in order to receive a patent under the Act:

> The Secretary of the Interior (a) shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation, or (b) may, in his discretion, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestor or grantors, under claim or color of title for the period commencing not later than January 1, 1901, to the date of application, during which time they have paid taxes levied on the land by State and local governmental units, issue a patent for not to exceed one hundred and sixty acres of such land upon the payment of not less than $1.25 per acre: * * *.

A claim under part (a) of this section is defined by the Department as a claim of class 1; a claim under part (b) is defined as a claim of class 2. 43 CFR 2540.0-5(b).

In order to satisfy the statutory requirements for a claim of class 1, appellants must show, inter alia, that Tracts 37 and 38 "have been held in good faith and in peaceful adverse possession by [them, their] ancestors or grantors, under claim or color of title for more than twenty years." They must establish a claim of title for more than 20 years based on an instrument which, on its face, purports to convey title to Tracts 37 and 38. See Jerome L. Kolstad, 93 IBLA 119, 121 (1986); Carmen M. Warren, 69 IBLA 347, 349 (1982); Anthony T. Ash, 52 IBLA 210 (1981); Marie Lombardo, 37 IBLA 247 (1978). The burden of establishing that the requirements of the Act have been met is clearly upon the appellant. As we stated in Corrine M. Vigil, 74 IBLA 111, 112 (1983):

> An applicant under the Color of Title Act has the burden of proof to establish to the Secretary of the Interior's satis-faction that the statutory conditions for purchase under the Act have been met. Jeanne Pierresteguy, 23 IBLA 358, 83 I.D. 23 (1975); Homer W. Mannix, 63 I.D. 249 (1956). The applicant must establish that each of the requirements for a class 1 claim has been met. A failure to carry the burden of proof with respect to one of the elements is fatal to the application. Lester Stephens, 58 IBLA 14 (1981).

In this case, appellants state in their application that "there are no conveyances whatsoever in the chain of title to the subject real estate which make reference to Tract 37 and/or Tract 38." In support of their application, appellants submit a quitclaim deed dated October 21, 1985, by which Helen N. Lisk conveys her interest in Tracts 37 and 38 to appellants. This quitclaim deed refers to separate deeds dated September 5, 1980, by which Helen N. Lisk and her brother, Fritz Lisk, conveyed their interests in government lots 2 and 3 of sec. 6, T. 119 N., R. 28 W., Wright County, Minnesota, believing that those lots included the two islands referred to as Tracts 37 and 38 in the BLM survey completed in 1981. Obviously, these documents fail to establish a claim of title for 20 years. Appellants' belief, that when they purchased lots 2 and 3 of sec. 6, Tracts 37 and 38 were included, does not satisfy the requirements of the Act. See Jerome L. Kolstad, supra at 121.

Further, the Last Will and Testament by which William Frank Kerkela devised to Alvin Leukuma "[a]l the rest, residue and remainder of [his] property, real, personal or mixed," does not qualify as an instrument which, on its face, purports to convey title to Tracts 37 and 38. The fact that this unprobated will is yet subject to probate, with the result that William Frank Kerkela's interest would be decreed to Alvin Leukuma, is of no immediate consequence under the Color of Title Act. The critical question is whether William Frank Kerkela owned Tracts 37 and 38, so that they were subject to disposition under his will. Appellants have submitted no documents to establish his ownership of those tracts.

Appellants have failed to show a chain of title of more than 20 years based on an instrument which, on its face, purports to convey title to the land in question. We therefore conclude that appellants have not met their burden of proof, and that BLM properly rejected their application under class 1.

[2] In order to establish a class 2 claim under the Color of Title Act, appellants must show a "claim or color of title for the period commencing not later than January 1, 1901, to the date of application during which time they have paid taxes levied on the land by State and local governmental units." Because appellants unquestionably failed to meet the chain of title requirements, as discussed supra, BLM properly rejected their class 2 claim on this basis. Agee S. Broughton, Jr., Trustee, 95 IBLA 343, 344 (1987); see 43 CFR 2540.0-5(b).

In its decision, BLM failed to note that appellants' tax levy and payment report, submitted with their color-of-title application, revealed that they could not establish the payments of taxes on the subject property from January 1, 1901, to the date of the application. In fact, in this report, they state that they "are not in a position to affirmatively state that real estate taxes have, at any time, been directly assessed or paid on the two parcels described as Tracts 37 and 38." The inability to establish the payment of taxes on the two parcels amounts to a failure to meet a statutory prerequisite to the grant of a class 2 color-of-title application. Agee S. Broughton, Jr., Trustee, supra at 344.

[3] Finally, BLM rejected appellants' application for both class 1 and class 2 color-of-title claims because they "have failed to meet the good faith requirements." The Color-of-Title Act requires a showing that the land claimed under either class 1 or class 2 is held in good faith, i.e., that the claimants and their predecessors honestly believe they and their predecessors were invested with title. E.g., Kim C. Evans, 82 IBLA 319, 321 (1984). In determining whether the claimants honestly believed that there was no defect in title, the Department may consider whether such belief was unreasonable in light of the facts actually known to claimants. Patti L. Keith, 100 IBLA 89, 92 (1987); Lawrence E. Willmorth, 64 IBLA 159, 160 (1982).

As BLM points out, in their October 8, 1985, affidavit, appellants disclose that in 1962, William Kerkela learned from "people at the Court House * * * 'that there was no deed or other record indicating any ownership in the name of Kerkela'; (or other words to that effect)." Alvin Leukuma, one of the color-of-title applicants involved herein, accompanied William Kerkela to the courthouse, and thus would have learned then of the defect in title to the land. Additionally, in her affidavit dated October 8, 1985, Helen Lisk asserts that "the Kerkela family never actually held title to either island * * *."

We conclude that any belief entertained by William Kerkela that he owned the two islands would have been unreasonable in light of the facts actually known to him. Thus, even if his will qualified as an instrument which purports on its face to convey Tracts 37 and 38, BLM properly rejected

their claims of class 1 and class 2, since Alvin Leukuma knew in 1962 that William Kerkela did not have title to the islands.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

John H. Kelly
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Bruce R. Harris
Administrative Judge